

**United States Department of Labor
Employees' Compensation Appeals Board**

E.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kearny, NJ, Employer**

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**Docket No. 11-1576
Issued: May 14, 2012**

Appearances:

Thomas R. Uliase Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2011 appellant, through her attorney, filed a timely appeal from a March 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of total disability from July 10 to October 26, 2010 due to her accepted condition of carpal tunnel syndrome.

On appeal appellant, through counsel, contends that OWCP improperly weighed the medical evidence and improperly engaged in physician shopping. Counsel further argues that

¹ 5 U.S.C. 8101 *et seq.*

² Appellant's compensation benefits were terminated in a separate decision dated October 18, 2010. Because that decision was reversed by the hearing representative on March 10, 2011 the termination issue is not ripe for decision.

the employing establishment withdrew appellant's limited-duty assignment and that the limited-duty assignment was not in compliance with the restrictions as set by appellant's physician.

FACTUAL HISTORY

On September 1, 2003 appellant, then a 48-year-old keyer, filed an occupational disease claim alleging that she suffered from carpal tunnel syndrome as a result of repetitive keying during her federal employment. On June 22, 2006 OWCP accepted her claim for bilateral carpal tunnel syndrome. Appellant had surgery for left carpal tunnel release on September 14, 2006 and underwent a right carpal tunnel release on February 2, 2009. OWCP paid compensation benefits for periods following the surgeries.

Appellant was treated by Dr. Mark A.P. Filippone, a Board-certified physiatrist. In a July 9, 2009 report, Dr. Filippone stated that she could return to work full-time limited duty as of July 10, 2009.

On July 21, 2009 the employing establishment made appellant an offer of modified assignment (limited duty) as a mail handler. The position required her to work the automated flats sorting machine (AFSM) placing flats into cartons, working belts and racks, working sorting and lifting equipment for weights up to 10 pounds and performing mail handler duties including lifting up to 10 pounds. Appellant accepted this position on July 23, 2009. Dr. Filippone continued to submit medical reports indicating that she remained partially disabled with the same work limitations. He noted that appellant sustained a new injury on November 27, 2009 when she tripped and fell on the floor at work and landed on both hands. Dr. Filippone allowed her to return to work on December 2, 2009 but did not allow repetitive movements of the upper extremities.

In a January 20, 2010 report, Dr. Lynne Carmickle, a second opinion Board-certified neurologist, diagnosed appellant with cervical muscle strain resulting from a work-related incident of October 21, 2003 with no objective signs of cervical radiculopathy and bilateral carpal tunnel syndrome by history. She noted that appellant remained capable of working full time at her customary job but should have minimal restrictions of not lifting more than 15 pounds and avoiding repetitive movements if possible. Dr. Carmickle further noted that if it was necessary that appellant perform repetitive movements that she should be able to take a 15-minute break every 2 hours. In a January 27, 2010 report, she clarified her prior opinion by noting that appellant required no further treatment as she received maximal benefit from treatment. Dr. Carmickle opined that appellant was fit for duty as a mail handler, but reiterated that, due to her underlying diabetes and a diagnosis of bilateral carpal tunnel syndrome, it is appropriate for her to have some minimal restrictions of not lifting more than 15 pounds and avoiding repetitive movements, if possible.

In a February 2, 2010 report, Dr. Filippone reviewed objective studies and stated that, in his professional medical opinion, the electrical abnormalities are directly and solely the result of the injuries sustained while at work. In a March 25, 2010 report, he noted that appellant still had bilaterally positive Phalen's sign, left more so than right and bilaterally positive Tinel's left more than right. In an April 26, 2010 report, Dr. Filippone noted that she returned to work on April 9, 2010 and that the return to work had not aggravated her symptoms. He recommended that

appellant continue with her present limitations but anticipated that within six months she would be able to do her bid job.

In a March 16, 2010 report, Dr. Andrew M. Hutter, a Board-orthopedic surgeon to whom OWCP referred appellant for a second opinion, noted her status as post bilateral carpal tunnel release. He opined that she could continue to work with a 10-pound lifting restriction and stated that a functional capacity evaluation (FCE) should be performed. In a May 9, 2010 addendum, Dr. Hutter stated that, after reviewing the FCE, appellant is noted to be capable of sedentary work, which is lifting up to 10 pounds occasionally with sitting most of the time and occasional walking and standing.

OWCP required appellant to have a follow-up appointment with Dr. Hutter to determine if conditions were permanent but Dr. Hutter was not available for a reevaluation. On May 4, 2010 it referred her for a second opinion to Dr. Wayne J. Altman, a Board-certified orthopedic surgeon. In a May 24, 2010 report, Dr. Altman stated that appellant appeared to have evidence of some mild, residual nerve irritation to her left wrists. He noted that the electromyogram (EMG) and nerve conduction study (NCS) done in November or December 2009 needed to be obtained and provided for completeness. After a review of the EMG results, Dr. Altman opined that appellant no longer had any work-related disability and could continue to work in her normal capacities as a mail handler.

On June 3, 2010 the employing establishment made an offer of modified assignment (limited duty) wherein it offered appellant a position as a sack sorting machine operator. The physical requirements of this job required her to stand/fill cartons with flats, lift up to 10 pounds, work the belts and sacks weighing up to 10 pounds (standing); and sort and lift empty equipment weighing up to 10 pounds. Appellant was to perform these assignments for eight hours a day. She accepted this position "under protest." Appellant submitted a note, also dated June 3, 2010 wherein she protested the description of the task and noted the agreement that she would get a 20-minute break after every 1½ hours standing.

In a July 8, 2010 letter, the employing establishment noted that it presented appellant with a job offer which she accepted on June 3, 2010, but that on July 6, 2010 she told her manager that she was unable to use the equipment needed. The employing establishment stated that they are treating this as a refusal of the job offer.

In a July 8, 2010 report, Dr. Filippone reiterated his prior restrictions in a new duty status report. He indicated that appellant was limited to lifting/carrying 10 pounds. However, Dr. Filippone also noted that she was not to work on the flat sorting machine (FSM). In the accompanying report, he noted his displeasure with the employing establishment. Dr. Filippone believed that the employing establishment was trying to overwhelm appellant with forms and road blocks to allowing her to return to work in a limited-duty capacity. In a July 20, 2010 note, he stated that she continued in his care and that he anticipated that she would be able to do her bid job within six months.

In a July 23, 2010 supplement to his report, Dr. Altman stated that he reviewed the EMG/NCS report dated June 17, 2010 and that, based on this test, appellant's carpal tunnel syndrome had totally resolved.

On July 24, 2010 appellant filed a notice of recurrence alleging a recurrence of disability due to the accepted 2003 injury. She stated that she was sent home and was told not to come back to work. The employing establishment controverted the claim.

In an August 10, 2010 letter to OWCP, appellant stated that, on June 30 and July 1, 2010, she was out of work because she was having a problem with her hand. She stated that, after describing her duties on the FSM, Dr. Filippone completed a form dated July 6, 2010 stating that she cannot tolerate working on the FSM. Appellant stated that on July 7, 2010 she gave a copy of this form to Mr. Rozier, who sent her home, stating that they had no work because of the new medical restriction. She contended that the medical limitation was not new. Appellant argued that she did not refuse work; rather she was told not to come back to work. She stated that her duties were changed on June 8, 2010 to the FSM. Appellant contended that the job was not given to her in good faith and argued that she was told on July 8, 2010 not to come back to work.

A representative from the employing establishment responded to appellant's statement and noted that the June 3, 2010 job offer reflected the most recent medical evidence she submitted which was dated April 6, 2010. Although appellant had stated that she had new medical documentation she did not have a copy of it with her. Michael G. Kitora noted that her Form CA-17 of July 6, 2010 contained the restriction "cannot tolerate working on the FSM." Mr. Kitora noted that working on the FSM was the primary duty of appellant's job and since she could not perform this job, she was sent home. He noted that a search was done for necessary work that she could perform within a 50-mile radius and no necessary work was found.

An August 20, 2010 letter from the employing establishment, received September 13, 2010, stated that appellant had been offered a modified limited-duty assignment on June 3, 2010. Jacqueline Rowan, Chairperson of the District Reasonable Accommodation Committee for the employing establishment noted that appellant accepted the limited-duty assignment under protest as her restrictions had changed. Appellant was advised to go to her physician and have him verify the restrictions.

In a September 21, 2010 report, Dr. Filippone stated that appellant persisted with atrophy of the right thenar eminence, had bilaterally positive Phalen's sign and bilaterally positive Tinel's signs. He stated that she "could obviously not do repetitive movements." Dr. Filippone explained that, although appellant did benefit from bilateral carpal tunnel surgical releases, she still had distinct residuals of carpal tunnel syndrome and the surgery improved did not correct the problem. He stated that she cannot go back to the work level that caused the carpal tunnel syndrome as she still is symptomatic and it is evident that allowing her to return to the higher level of weight and repetition would totally destroy her hands. Dr. Filippone stated that he is going to allow appellant to continue to work as per the limitations of his CA-17 form.

By decision dated October 4, 2010, OWCP denied appellant's claim for a recurrence. As Dr. Filippone's report failed to provide a medical explanation that her accepted condition of carpal tunnel syndrome had worsened.

Appellant, through counsel, requested a hearing by letter dated October 8, 2010.

By decision dated March 10, 2011, the hearing representative affirmed the denial of appellant's claim for a recurrence.

LEGAL PRECEDENT

When an employee, who is disabled from the job she held when injured on account of employment residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee thereafter has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.³

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome as a result of her federal duties. Appellant returned to work after her surgeries. On June 3, 2010 the employing establishment offered her another limited-duty assignment, a position which she accepted under protest. On July 8, 2010 appellant was sent home after she showed her supervisor a note from her treating physician, Dr. Filippone, wherein he stated that she was not to work on the FSM. The employing establishment indicated that, as this was her job and there was no other position available within her restrictions, she was sent home.

Appellant claimed compensation for the period July 10 to October 26, 2010. OWCP denied her claim for a recurrence on October 4, 2010 and this was affirmed by the hearing representative in a decision dated March 10, 2011.

With regard to whether there was a change in the nature and extent of the injury-related condition, appellant submitted a medical report by her physician, Dr. Filippone, dated July 6, 2010. This report did not differ from her previous restrictions set by Dr. Filippone except that he stated that she could not tolerate working on the FSM. The restrictions with regard to lifting 10 pounds had already been in place and the job did not require that appellant lift more than 10 pounds. Dr. Filippone did not provide any explanation as to why she could not work on the FSM. He did not indicate that he had an understanding as to what appellant's duties on this machine were nor did he explain the physical reasons she could no longer work on this machine, other than a vague reference that she could not tolerate working on the machine. This is not sufficient to establish a change in appellant's condition sufficient to indicate that she could no longer perform the limited-duty position.

The Board notes that the hearing representative discussed other medical reports that are in the record. On appeal, appellant's attorney makes several arguments about these reports. However, the reports of Drs. Carmickle, Hutter and Altman, were used by the hearing representative in evaluating the issue of whether the termination of appellant's benefits was proper. These reports were not discussed in connection with the recurrence. In fact, the

³ A.J., Docket No. 11-1894 (issued March 12, 2012); *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

examinations by these physicians predated the recurrence and are not relevant to the issue. Appellant had the burden of proof to establish the recurrence. In support thereof, she submitted the reports by Dr. Filippone. These reports were not sufficient to establish a recurrence of disability for the reasons stated above. Accordingly, appellant did not meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability from July 10 to October 26, 2010 due to her accepted condition of carpal tunnel syndrome

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2011 is affirmed.

Issued: May 14, 2012
Washington, D.C.

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board